Supreme Court, U.S.
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No. 98-1869

IN THE

Supreme Court of the United States

SAMUEL DOUGLAS GAGLIANO,

Petitioner,

v.

STORAGE TECHNOLOGY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did petitioner present sufficient evidence below to overcome summary judgment in respondent's favor on petitioner's claims of age discrimination, under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*; reverse gender discrimination, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*; and disability discrimination, under the Americans with Disabilities Act, 29 U.S.C. § 706?

2. Did the district court commit reversible error by excluding petitioner's tendered Exhibits 4, 5, 6, 7, 8, 9, 4-A and 8-A at trial of petitioner's retaliation claim?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Storage Technology Corporation states that it has no parent corporation and that the following publicly held entities own 10% or more of the corporation's stock:

1.	Capitol Research and Management Co. 333 South Hope Street Los Angeles, CA 90071	10.6%
2.	Legg Mason, Inc. 100 Light Street Baltimore, MD 21202.	10.48%

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Respondent, Storage Technology Corporation ("StorageTek"), respectfully requests that petitioner Samuel Douglas Gagliano's Petition for Writ of *Certiorari* ("Petition") to the United States Court of Appeals for the Tenth Circuit be denied for the reasons and authorities cited herein.

STATEMENT OF THE CASE

Petitioner, a white male, was hired by StorageTek in April 1985 as a Senior Human Resources Representative at its Printer Operations Division in Palm Bay, Florida. In April, 1991, as a result of a reduction-in-force ("RIF") at that location, petitioner transferred to StorageTek headquarters in Colorado, continuing his duties as Senior Human Resources Representative until his notification of termination on January 21, 1993.

Due to business necessities, StorageTek reorganized many of its departments and implemented a series of RIF's. On January 21, 1993, petitioner was notified of his selection for termination as a result of a RIF, which termination was to be effective in February of 1993. The RIF at issue involved the termination of in excess of one hundred StorageTek employees. Petitioner was 44 years old at the time his employment terminated.

In the RIF at issue, respondent eliminated two Senior Human Resources Representative positions, petitioner and a Mr. Fernandez. Four of the seven individuals in petitioner's work group were male. The two individuals whose positions were eliminated were males over 40. Some of the individuals who remained in the department after the RIF were females who were younger than petitioner. Some

of those individuals assumed a portion of the duties previously performed by petitioner but his position was not filled. Subsequent to the RIF in question in approximately May, 1993, and January, 1994, respondent filled two Organizational Development positions within the Human Resources department. These positions had been open for some time and petitioner did not formally apply for these positions, which are entirely distinct from the Senior Human Resource Representative position held by petitioner. Petitioner asserts that he was qualified for the Organizational Development positions but respondent presented proof at trial that this is not the case.

Petitioner correctly points out, at page 3 of the petition, that respondent had a common practice of evaluating and ranking employees who were being considered for lay-off by reviewing the last two annual written performance evaluations of employees within the same or similar classification and organization. However, this was not the exclusive method of selecting employees for lay-off within StorageTek and the "paired comparison or forced ranking method" was, in fact, utilized in Petitioner's department in the RIF at issue. It is a misstatement of fact that this method was used for the first time in the Human Resource department, as suggested by petitioner at page 3 of the petition.

Petitioner urged in support of his Americans with Disabilities Act ("ADA") claim that he suffered from dysthymia and post-traumatic stress disorder. Petitioner's alleged specific disability was that he could not work for his manager, Jim Hartsfield, because Mr. Hartsfield reminded petitioner of his father and caused petitioner to suffer "flashbacks." Petitioner agreed that he could work

for any manager other than Mr. Hartsfield and he alleges that in December of 1992, prior to his notice of termination, he requested a transfer to another supervisor.[1] Petitioner does not contend that his dysthymia and post-traumatic stress disorder had ever affected his ability to perform any other job before or after his employment with StorageTek.

Subsequent to his notice of termination, petitioner took various steps purportedly in accordance with StorageTek's "open door" policy in an effort to convince respondent to either reconsider its termination decision or to consider him for the Organization Development positions. Petitioner asserts that, during the course of his "open door" appeal of his termination, he advised Tonda Franklin, a StorageTek employee, that he would file a charge of discrimination with the Equal Employment Opportunities Commission if he was not reinstated or considered for one of the Organizational Development positions. Petition, p. 6. Petitioner further asserts that he was advised by Ms. Franklin that Tavia Campbell, her supervisor, stated that petitioner would not be considered for the Organizational Development positions or any positions because he had threatened to file a charge of discrimination. Petition, p. 9. The evidence at trial on petitioner's claim of retaliatory failure to re-hire does not support this assertion. It is a misstatement of fact.

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1. At page 3 of the petition, petitioner characterizes the failure to transfer petitioner as "denying the petitioner's request for a reasonable accommodation." In fact, petitioner had not advised respondent he considered himself disabled and had not requested a reasonable accommodation. This characterization is a misstatement of both fact and law.

INTRODUCTION

Petitioner seeks review of the decision below affirming the trial court's grant of summary judgment on petitioner's age discrimination, reverse gender discrimination and disability discrimination claims. Petitioner also seeks review of the decision below affirming the trial court's exclusion of certain tendered exhibits (No. 4, 5, 6, 7, 8, 9, 4-A and 8-A) at the trial of petitioner's retaliation claim. The petition addresses several issues in this case. The first is whether the trial court and the court of appeals utilized the proper allocation of proof in an age discrimination case in a RIF setting. Second is whether, in petitioner's reverse gender discrimination claim, the trial court and the court of appeals correctly applied relevant case law in determining that Petitioner had not established a *prima facie* case. Third is whether petitioner was an individual with a disability under the meaning of the ADA and whether he was terminated as a result of that disability. The final issue is whether the trial court committed reversible error in excluding certain proffered exhibits, which were documents prepared by petitioner as part of his attempt to utilize StorageTek's "open door" appeal procedure. Because the Court of Appeals fully considered and correctly decided all of the issues in this case, there is no need for review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY FOLLOWED APPLICABLE LAW REGARDING PROOF OF A *PRIMA FACIE* CASE IN AN AGE DISCRIMINATION CASE IN A REDUCTION IN FORCE SETTING.

Petitioner has failed to set out any "compelling reasons" why this Court should grant the petition.[2] Rather, he asserts that the trial court held that the petitioner must establish a *prima facie* case for a reduction-in-force case, pursuant to *Price v. Public Service Company of Colorado*, 850 F. Supp. 934, 949 (D. Colo. 1994), 89 F.3d 851 (10th Cir. 1996) (reversed on other grounds), *on remand*, 1 F. Supp. 2d 1216 (D. Colo. 1998), showing: (1) that he is a member of the protected group; (2) that he was doing satisfactory work; (3) that he was discharged; and (4) that the employer discriminated against him on the basis of age.

Petitioner contends that this standard should not apply because, since there was no actual reduction in head count in the Human Resources department, there was no reduction-in-force. Petitioner ignores the fact that StorageTek laid off in excess of one hundred employees during the RIF at issue herein. Moreover, the fact that an employer is hiring at the time of a RIF does not mean that a

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2. "Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons." Rules of the Supreme Court of the United States, Rule 10.

RIF is pretextual. *See Doan v. Seagate Technology, Inc.*, 82 F.3d 974, 977 (10th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997); *Furr v. Seagate Technology, Inc.*, 82 F.3d 980, 986 (10th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997).

Petitioner asserts that because he contests the validity of the RIF, he was entitled to have his claim determined by the *McDonnell Douglas* "three step analysis" used in routine discharge cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This is a distinction without merit. Under *McDonnell Douglas* and its progeny, in an ADEA discharge case, the plaintiff must carry the initial burden of establishing a *prima facie* case by showing: (1) that he is a member of a protected group; (2) that he was performing satisfactorily; (3) that he was discharged; and (4) that he was replaced by a younger worker.[3] *McDonnell Douglas*, *supra* at 802; *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547, n.1 (10th Cir. 1988). "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's [discharge]." *McDonnell Douglas*, *supra* at 802. A reduction-in-force is a legitimate, nondiscriminatory reason for discharge. *Furr v. Seagate Technology, Inc.*, *supra* at 985. The employee is then to be "afforded a fair opportunity" to show that the stated legitimate, nondiscriminatory reason is a pretext for discrimination. *McDonnell Douglas*, *supra* at 804. Thus, under either scenario, *Price v. Public Service Co. of Colo.*, *supra*, as cited by the trial court, or *McDonnell Douglas*, *supra*, as argued by petitioner, petitioner ultimately bears

3. Petitioner asserts that he was replaced by a younger worker because some of his job duties continued to be performed by remaining Human Resources employees. His position, however, was not filled. The district court specifically found that Petitioner had not been replaced. Petition, Appendix C, p. 39a.

the burden of showing that the "stated reason for [petitioner's discharge] was in fact pretext." *Id.* Petitioner failed to meet this burden[4] and has failed to assert any compelling reason for this Court to grant the petition for *certiorari*.

II.

THE COURT OF APPEALS CORRECTLY FOLLOWED APPLICABLE LAW REGARDING PROOF OF PETITIONER'S REVERSE GENDER DISCRIMINATION CLAIM.

The Tenth Circuit correctly applied relevant case law to uphold the district court's grant of summary judgment in respondent's favor on petitioner's reverse gender discrimination claim. Petitioner contends that he was required to demonstrate through the presentation of

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4. Petitioner contends he should have been given the opportunity to establish pretext by "indirect proof", relying on purported statements by his manager that petitioner was "inflexible." Petitioner argues "inflexible" means he was seen as an older worker, claiming that, on respondent's motion for summary judgment, he should have been given the advantage of "any possible inference" in his favor to establish that fact, citing *MacDonald v. Eastern Wyoming Center*, 941 F.2d 1115 (10th Cir. 1991). The language in the *MacDonald* case regarding "any possible inference" is simply anomalous. This Court has consistently held that "in ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all *justifiable* inferences are to be drawn in [that party's] favor.' " *Hunt v. Cromartie*, __ U.S. __, 119 S. Ct. 1545, 1551-1552 (1999) (emphasis supplied), citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). To equate the term "inflexible" with age discrimination is not a justifiable inference.

background evidence that the respondent was that unusual employer who discriminated against the majority. A review of the district court's bench ruling (Petition, Appendix C) and the Order & Judgment of the Court of Appeals (Petition, Appendix A) makes it clear that this is not the case.

In *Notari v. Denver Water Department*, 971 F.2d 585 (10th Cir. 1992), the case relied on by petitioner, the court held that:

> The McDonnell Douglas presumption — that is, the presumption that unless otherwise explained, discrimination is more likely than not the reason for the challenged decision — is valid for a reverse discrimination claimant only when the requisite background circumstances exist. . . . [A] Title VII disparate treatment plaintiff who pursues a reverse discrimination claim, *and seeks to obtain the benefit of the McDonnell Douglas presumption*, must, in lieu of showing that he belongs to a protected group, establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority.

Notari, *supra* at 589 (emphasis supplied). A showing of background circumstances is *only* required when a reverse discrimination claimant seeks to obtain the benefits of the *McDonnell Douglas* presumption. *Notari*, however, provides an alternative method of proof for the reverse discrimination claimant, which was acknowledged and applied in this case by both the district court and the court of appeals.

> Thus, a [reverse discrimination] plaintiff who presents direct evidence of discrimination, or indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff states a *prima facie* case of intentional discrimination under Title VII.

Notari, *supra* at 590.

The district court, citing *Notari*, specifically sets out this alternative method of proof at page 37a of Appendix C. The district court then reviewed the evidence brought forward by petitioner, Appendix C, pp. 37a-39a, and found that it was "insufficient to support a reverse discrimination claim and a jury determination of reverse discrimination." Appendix C, p. 39a. The Tenth Circuit likewise correctly applied the *Notari* holding:

> Similarly, as to the reverse sex discrimination claim, the district court correctly found that Mr. Gagliano had not presented background evidence supporting the inference that Storage Technology discriminated against men *nor* sufficient indirect evidence that but for his gender he would not have been terminated.

Petition, Appendix A, p. 3a, (emphasis supplied) citing *Notari*, *supra*.

Petitioner has failed to assert any basis on which this Court should grant his petition on the reverse gender

discrimination claim.[5] The courts below correctly applied the applicable rule of law, as set out in the *Notari* decision, and the petition for *certiorari* should be denied.

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5. Petitioner has not asserted in his petition, or below, a conflict among the circuits as to heightened scrutiny in a reverse discrimination case. Several circuits, including the Tenth Circuit, require a showing of background circumstances in order for a reverse discrimination claimant to have the advantage of the *McDonnell Douglas* presumption. *See, for example, Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1839 (1998); *Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C. Cir. 1986), *appeal after remand*, 97 F.3d 1088 (D.C. Cir. 1995); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985). Other circuits have expressly declined to decide whether a showing of background circumstances is required in a reverse discrimination case. *See, for example, Hill v. Burrell Communications Group, Inc.*, 67 F.3d 665, 668, fn. 2 (7th Cir. 1995); *Lucas v. Dole*, 835 F.2d 532, 534, fn.8 (4th Cir. 1987) *cert. denied*, 494 U.S. 1026 (1990). Yet other circuits have simply applied the *McDonnell Douglas* formula without any discussion of a showing of background circumstances. *See, for example, Schoenfeld v. Babbitt*, 168 F.3d 1257, 1267 (11th Cir. 1999); *Pettiti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 32 (1st Cir. 1990). *Certiorari* should not be granted on this basis since it has not been raised by petitioner in any fashion, either in his petition, before the Tenth Circuit or before the district court. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, __ U.S. __, 119 S. Ct. 1961, 1969, fn 3 (1999). Moreover, petitioner shows no compelling reason why *certiorari* should be granted on this issue since the case can be decided on petitioner's failure to produce sufficient indirect evidence of discrimination, as found by both courts below.

III.

THE COURT OF APPEALS CORRECTLY FOLLOWED APPLICABLE LAW IN DETERMINING THAT PETITIONER DID NOT ESTABLISH A *PRIMA FACIE* CASE OF DISABILITY DISCRIMINATION UNDER THE ADA.

Petitioner alleged insufficient facts to create a genuine issue of material fact as to whether he is disabled under the ADA. The term "disability" means (A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of having such impairment; or C) being regarded as having such impairment. *Sutton v. United Air Lines*, __ U.S. __ , 1999 WL 407488, 5 (1999); 42 U.S.C. § 12102(2). Petitioner alleges that he suffered from the mental impairments of dysthymia, which the district court found to be "a depressive sort of mental condition," and post traumatic stress disorder and that he was in mental health therapy prior to and at the time of the termination of his employment. Petitioner failed to present sufficient evidence to establish a *prima facie* case because he failed to show how these "impairments" substantially limited one or more major life activities.

Petitioner alleges that his impairment substantially limited the major life activity of working. "To be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job."[6] *Murphy v. United Parcel Service*, __ U.S. __, 1999 WL 407472, 4 (1999), citing 29 C.F.R.

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6. Petitioner's argument that he was "regarded" as having a disability is discussed *infra*.

§ 1630.2(j)(3)(i). "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Sutton*, *supra* at 14. The EEOC regulations on the ADA, cited by both *Murphy* and *Sutton*, state that "[t]he inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). *See also Bolton v. Scrivner*, 36 F.3d 939, 942 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995). In *Murphy*, petitioner was a mechanic who was fired because, as a result of high blood pressure, he could not obtain Department of Transportation certification which would allow him to drive "commercial vehicles." This Court found that:

> [t]he evidence that petitioner is regarded as unable to meet the DOT regulations is not sufficient to create a genuine issue of material fact as to whether petitioner is regarded as unable to perform a class of jobs utilizing his skills . . . [i]ndeed it is undisputed that petitioner is generally employable as a mechanic.

Murphy, *supra* at 5.

In this case, it is undisputed that petitioner only claimed that his "impairment" restricted him from working with one manager within StorageTek, Jim Hartsfield. In fact, petitioner alleges that in December, 1992, before being advised of his lay-off, he requested a transfer to another manager, thus evidencing his belief that he could perform the essential functions of his job as Senior Human Resources Representative under another manager. *See* petition, p. 23.

The district court, citing *Bolton*, *supra*, correctly found that petitioner "must demonstrate that he was unable to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. Petition, Appendix C, p. 40a. The Tenth Circuit affirmed the finding that petitioner "had not established a prima facie case because he did not show that he had a disability under the ADA statutory definition." Petition, appendix A, p.3a. The courts below correctly followed applicable Tenth Circuit authority, *Bolton*, *supra*, which is in line with the recent decisions of this Court.

Petitioner also claims that he was disabled because he had a record of having an impairment and was regarded by respondent as having an impairment.[7] This Court in *Sutton* clarified the meaning of "being regarded as having" a disability:

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual . . .

Sutton, *supra* at 12.

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7. Petitioner asserts the same factual basis for both being regarded as having an impairment and having a record as having an impairment.

Petitioner claims that he had a record of and was regarded as having a disability because he claims to have discussed his mental health therapy with his supervisor, with his human resources representative and with other management employees in the Human Resources department. Petition, p. 23. Respondent's witnesses at trial denied this and it is a misstatement of fact. Petitioner does not claim and did not present the district court with any facts to show that he advised those individuals the nature of the impairments he claims to have suffered or the fact that he considered those impairments to be a disability. He merely claims to have discussed the fact that he was in therapy. This Court's recent decision in *Murphy* makes it clear that in order to be regarded as substantially limited in the major life activity of working, petitioner must be precluded from more than a particular job. *Murphy*, *supra* at 4. As fully set forth above, petitioner has failed to do so.

Petitioner has also failed to make any showing that respondent terminated his employment as a result of any misperceptions or mistaken beliefs regarding his alleged impairment, as required by *Sutton*. He asserts that, because he was "unceremoniously marched off the premises of the respondent on the day of his notification of layoff" and his badge and keys were demanded prior to departure, Petition, p. 24, an inference can be made that respondent was concerned about his mental condition. Even if such an inference were justifiable, that inference would have nothing to do with the fact that petitioner was terminated, only with the manner in which his termination was accomplished. It evidences no misperceptions with regard to his mental state leading up to his termination as a result of the reduction-in-force.

Petitioner has failed to make any showing of compelling reasons why this Court should grant the writ of *certiorari* on his disability discrimination claim. The district court and court of appeals correctly followed applicable Tenth Circuit law, which is fully in line with this Court's recent decisions in *Murphy v. United Parcel Service*, *supra*, and *Sutton v. United Air Lines*, *supra*. The writ should be denied.

IV.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S EXCLUSION OF PETITIONER'S EXHIBITS 4, 5, 6, 7, 8, 9, 4-A AND 8-A.

Evidentiary rulings are committed to the discretion of the trial court and are reviewed only for an abuse of discretion. *Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir. 1995); *United States v. Jones*, 44 F.3d 860, 873 (10th Cir. 1995). Deference to the trial court is heightened when reviewing rulings on hearsay issues. *Id.*

> [A] harmless error standard [applies] when reviewing trial courts' rulings on hearsay objections resting solely on the Federal Rules of Evidence. A harmless error is one that does not have a substantial influence on the outcome of the trial; nor does it leave one in grave doubt as to whether it had such effect.

Id. (citation omitted).

In this case, the only issue tried to the jury was whether respondent refused to re-hire petitioner because he allegedly

threatened to file a charge of discrimination with the EEOC. The challenged exhibits were hearsay statements that included numerous references to petitioner's claims of age, reverse gender and disability discrimination, all of which had been resolved in respondent's favor on summary judgment.

The challenged exhibits are:

1. Exhibit 4, a twenty page letter with thirty pages of attachments written by petitioner to Mr. Sewell Sleek, a corporate vice president of StorageTek. The document was authored on March 22, 1993, some sixty days after petitioner's notification of selection for RIF and forty-five days after his actual termination. The document contains references to all of petitioner's complaints of age, gender and disability discrimination and includes a chronology of events dating back to April, 1985.

2. Exhibit 5, a two page memo written by petitioner to Mr. Sleek. The document was written on April 3, 1993, seventy-four days after petitioner's notification of termination and fifty-nine days after his actual termination. The exhibit does not reference retaliation and describes incidents that predate petitioner's notification of selection for RIF, more than seventy days after their occurrence.

3. Exhibit 6, a four page letter with eleven pages of attachments written by petitioner to Mr. Ryal Poppa, then president and chief executive officer of StorageTek. The letter was written on April 29, 1993, one hundred days after petitioner's notification of termination and eighty-five days after his actual termination. The exhibit outlines petitioner's complaints against respondent, including complaints of

discrimination which were resolved on summary judgment, and contains allegations of facts that occurred before his notification of termination.

4. Exhibit 7, a seven page letter written by petitioner also to Mr. Poppa. The letter was written on July 30, 1993, almost six months after petitioner's actual termination. The exhibit outlines petitioner's complaints against the company, including complaints of discrimination which were resolved on summary judgment, and contains allegations of facts which occurred before his notification of termination.

5. Exhibit 8, a two page letter written by petitioner to Ms. Laurie Dodd, a corporate vice president of StorageTek. The letter was written on January 30, 1995, more than two years after petitioner's notification of selection for RIF. The exhibit outlines petitioner's complaints against the company, including complaints of discrimination which were resolved on summary judgment, and contains allegations of facts which occurred before his notification of termination.

6. Exhibit 9, a five page memorandum which outlines and summarizes petitioner's complaints against StorageTek, including complaints of discrimination that were resolved on summary judgment. The memorandum was prepared after May 10, 1993, more than three months after petitioner's termination. The exhibit contains allegations of facts that occurred while petitioner was employed with respondent in Florida, clearly long before his notification of termination in January, 1993.

7. Exhibit 4-A, a redacted version of Exhibit 4. It is three pages of the original fifty page document written to Mr. Sleek on March 22, 1993. The redacted exhibit contains references to occurrences that pre-date petitioner's notification of selection for RIF and span petitioner's fifteen years in the industry.

8. Exhibit 8-A, a redacted version of Exhibit 8. It is three pages of excerpts from the letter written to Ms. Dodd on January 30, 1995. The redacted exhibit contains references to occurrences that pre-date petitioner's notification of selection for RIF and includes references to conversations with Dwight Seeley, Esq., in house counsel for respondent, that occurred six months before the letter was written.

Petitioner asserts that these documents should have been admitted under the business records exception to the hearsay rule, Fed. R. Evid. 803(6), and the residual exception to the hearsay rule, Fed. R. Evid. 807.[8] Neither of those exceptions required admission of the documents at issue.

Fed. R. Evid. 803(6) provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (6) Records of regularly conducted activity. A memorandum, report, record, or data

8. Petitioner cites Rule 803(24) as the residual exception to the hearsay rule. That rule is now Rule 807.

> compilation, in any form, of acts, events, conditions, opinions, or diagnoses, *made at or near the time* by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, *and if it was the regular practice of that business activity to make the memorandum*, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Fed. R. Evid. Rule 803(6) (Emphasis supplied).

The rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to keep accurate records. *Timberlake Construction Co. v. U.S. Fidelity and Guar. Co.*, 71 F.3d 335, 341-342 (10th Cir. 1995). "It is well established that one who prepares a document in anticipation of litigation is not acting in the regular course of business." *Id.*

Petitioner was not a business, nor did he maintain these records in the course of a regularly conducted business activity. It was not the regular practice of respondent to "make" the documents at issue. The documents were created by petitioner not respondent. Petitioner sought to avoid the legitimate constraints of the hearsay rule under the guise of providing them to respondent. They are not business records of respondent.

Moreover, petitioner created the documents at issue well after his employment with respondent ended. They were not "made at or near the time" of the events described. The documents were prepared anywhere from two months after petitioner's notification of termination to two years thereafter.

Petitioner's documents fail all of the criteria underlying the business records exception. *See, e.g., Timberlake, supra* at 342 (excluding letters that had all of the earmarks of being motivated and generated to further plaintiff's interests). They do not meet the business records exception and were properly excluded. The Tenth Circuit correctly held that the district court did not abuse its discretion in doing so.

Additionally, petitioner argues that these exhibits should have been admitted under Fed. R. Evid. 803(24), now Rule 807. Rule 807 permits the admission of hearsay when the evidence offered is of a material fact, the statement is more probative for the point than other reasonably available evidence, and the general interest of justice will be served.

Rule 807 is the residual exception to the hearsay rule. *United States v. Tome*, 61 F.3d 1446,1451 (10th Cir. 1995).

> Courts must use caution when admitting evidence under Rule 803(24), for an expansive interpretation of the residual exception would threaten to swallow the entirety of the hearsay rule. As this Court has warned, Rule 803(24) should be used only 'in extraordinary circumstances where the court is satisfied that the evidence offers guarantees of trustworthiness

> and is material, probative and necessary in the interest of justice.'

Tome, *supra* at 1452, quoting *United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993).

Petitioner asserts that the exhibits contain all of the requirements permitting their admission pursuant to Rule 807; that they are (1) trustworthy, (2) necessary, (3) contain material facts, (4) will serve the interests of justice, and (5) were produced to the opponent. However, the exhibits contain volumes of facts that were no longer material to the case being tried, ranging from petitioner's personal history to his claims of age, gender and disability discrimination. They were neither material nor necessary. Further, as the district court correctly found, the exhibits were not the most probative evidence on the issues therein since petitioner was available to testify, and did testify, to the material facts contained in the exhibits.[9] Finally, the exhibits lacked trustworthiness since they were authored by petitioner for the self-serving purposes of regaining his employment and preparing for litigation.

Petitioner has asserted no compelling reason why this Court should grant his petition on evidentiary grounds. The Tenth Circuit properly applied an abuse of discretion standard in reviewing the district court's exclusion of the

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9. Even if the exclusion of the exhibits were construed to be an abuse of discretion, the failure to admit them was harmless error which did not have a substantial influence on the outcome of the trial. All information relevant to petitioner's retaliation claim contained in the exhibits was presented to the jury by petitioner's testimony and certain admitted redacted exhibits. No relevant evidence was withheld from the jury's consideration.

exhibits at issue, Petition, Appendix A, p. 4a. The petition for writ of *certiorari* should be denied on this issue.

CONCLUSION

For the reasons stated and authorities cited above, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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